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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE EASTERN DISTRICT OF CALIFORNIA**

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9 **MICHAEL F. SCHULZE.,**

10 **Plaintiff,**

11 **vs.**

12 **FEDERAL BUREAU OF INVESTIGATION,**
13 **DRUG ENFORCEMENT**
14 **ADMINISTRATION, UNITED STATES**
15 **MARSHALS SERVICE and DEPARTMENT**
16 **OF JUSTICE,**

17 **Defendants.**

1:05-cv-00180-AWI-GSA

**ORDER GRANTING MOTION OF
DEFENDANT DRUG ENFORCEMENT
ADMINISTRATION FOR
RECONSIDERATION OF COURT'S
ORDER OF OCTOBER 29, 2014;
ORDER DENYING PLAINTIFF'S
MOTION FOR INSTRUCTIVE ORDER
AND ORDER DENYING PLAINTIFF'S
MOTION TO COMPEL**

Doc. #'s 131, 133, & 142

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19 On October 29, 2014, the court issued an order denying without prejudice the motions of
20 defendants United States Drug Enforcement Administration ("DEA") and Federal Bureau of
21 Investigation ("FBI") for summary judgment as to all claims by plaintiff Michael Schultz
22 ("Plaintiff") (the "October 29 Order"). Both DEA and FBI had moved for summary judgement
23 on the ground that the documents requested by Plaintiff were protected from disclosure by
24 statutory exemptions pursuant to the Freedom of Information Act ("FOIA"). The motions for
25 summary judgment by DEA and FBI were denied without prejudice as premature and both
26 parties were ordered to produce Vaughn indexes. In so ordering, the court overlooked the fact
27 that DEA had also moved for summary judgment on the alternative ground that Plaintiff
28 expressed no willingness to pay the fees for production of documents estimated by DEA

1 pursuant to 28 C.F.R. § 16.1. On December 10, 2014, DEA moved for reconsideration of the
2 court's October 29 Order as to it only on the ground Plaintiff had failed to exhaust administrative
3 claims by failing to indicate willingness to pay the estimated fees. For the reasons that follow,
4 DEA's motion for reconsideration will be granted.

5 **FACTUAL BACKGROUND**

6 The general factual background of this case has been reviewed previously and need not
7 be repeated here. The following are facts alleged by DEA that pertain only to the issue of fee
8 requirements associated with Plaintiff's FOIA request to DEA.

9 Defendant DEA alleges it:

10 . . . commenced its search of the [IRFS] files by querying under Olaes'
11 and Ahlo's identifiers, and located potentially responsive investigation
12 files. [. . .] It then estimated the total search time needed, including
13 searching those files manually for the particular records in them that
14 pertain to Olaes or Ahlo. At the standard hourly rate (\$28.00), the
15 estimated search cost was \$8,400.00. [. . .] DEA wrote [P]laintiff with
16 the fee amount and requested payment. [. . .] DEA said that it would be
17 "presumed that you do not wish to pay the fees to conduct the search of
18 IRFS files" if response was not received within 30 days. [. . .] Plaintiff
19 returned the letter to DEA and expressed unwillingness to pay the fees,
20 giving as his reasons the fact that DEA had already "located his
21 potentially responsive files" and the *non sequitur* that DEA had already
22 "processed my request." [. . .] Although Plaintiff was given 30 days to
23 express willingness to pay, he has not done so.

24 Doc. # 114 at 26:4-15.

25 **LEGAL STANDARD**

26 Rule 60(b) permits a district court to relieve a party from a final order or judgment on
27 grounds of: "(1) mistake, inadvertence, surprise, or excusable neglect; (3) fraud . . . of an
28 adverse party, . . . or (6) any other reason justifying relief from the operation of the judgment."
The motion for reconsideration must be made within a reasonable time, in any event "not more
than one year after the judgment, order, or proceeding was entered or taken." *Id.* Motions to
reconsider are committed to the discretion of the trial court. *Combs v. Nick Garin Trucking*, 825
F.2d 437, 441 (D.C.Cir. 1987); *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc).

1 To succeed, a party must set forth facts or law of a strongly convincing nature to induce the court
2 to reverse its prior decision. See, e.g., Kern Tulare Water Dist. v. City of Bakersfield, 634
3 F.Supp. 656, 665 (E.D.Cal. 1986), *aff'd* in part and *rev'd* in part on other grounds, 828 F.2d 514
4 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015, 108 S.Ct. 1752, 100 L.Ed.2d 214 (1988).

6 DISCUSSION

7 I. Issue to be Determined

8 Plaintiff's request for an order compelling the production of a Vaughn index from DEA,
9 Document Number 142, presents the issue of whether DEA waived the right to assert the defense
10 of failure to exhaust administrative remedies based on failure to pay the estimated processing
11 fees because the issue was not raised during the administrative process. Plaintiff cites Friends of
12 the Coast Fork v. U.S. Dept. Interior, 110 F.3d 53 (9th Cir. 1997), among others, for the
13 proposition that a district court may not consider arguments that are raised by the agency before
14 the district court that were not raised during the administrative process. See id. at 55 ("the
15 agency must stand on whatever reasons for denial it gave in the administrative proceeding"). In
16 his motion to compel, Plaintiff alleges "[t]o be sure, at no point during the administrative process
17 did [D]efendant DEA request a payment from [Plaintiff], nor was it ever cited as a reason for
18 denying his FOIA requests." Doc. # 142 at 6.

21 The proposition asserted by Plaintiff through his reliance on the Ninth Circuit's holding
22 in Friends of the Coast Fork originated in a pair of Supreme Court decisions; SEC v. Chenery
23 Corp., 318 U.S. 80 (1943) ("Chenery I") and SEC v. Chenery Corp., 332 U.S. 194 (1947)
24 ("Chenery II"). In Chenery I, the Court prohibited courts reviewing agency decisions from
25 supplying any determination that the agency was solely empowered to make but which the
26 agency did not make. Chenery I 318 U.S. at 88 ("If an order is valid only as a determination of
27 policy or judgment which the agency alone is authorized to make and which it has not made, a
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1 judicial judgment cannot be made to do service for an administrative judgment.”) In the second
2 decision the Supreme Court clarifies the first by holding that when a court reviews an agency
3 decision that the agency alone is empowered to make, the court “must judge the propriety of
4 such action solely by the grounds invoked by the agency.” Chenery II, 332 U.S. at 196. The
5 shorthand for the holdings in this pair of cases is the prohibition against “post-hoc
6 rationalization.” See Louis v. U.S. Dep’t of Labor, 419 F.3d 970, 978 (9th Cir. 2005) (using the
7 term to describe the application of Chenery I and Chenery II in Friends of the Coast Fork, 110
8 F.3d 53).

10 As Plaintiff correctly notes, the refusal of DEA to provide documents responsive to
11 Plaintiff’s FOIA request on the ground Plaintiff refused to pay the estimated costs of production
12 first appeared in a letter from DEA to Plaintiff dated June 18, 2012; approximately seven years
13 and four months after the institution of this action. See Doc. # 114-4. Also, Plaintiff correctly
14 notes that his initial requests to DEA for information pertaining to Olaes was denied by DEA for
15 the first time on October 1, 2004, and on administrative appeal on December 27, 2004. Neither
16 the original denial nor the denial on administrative appeal mentioned Plaintiff’s failure to pay
17 estimated fees. Plaintiff’s FOIA request to DEA with regard to Ahlo was denied and the
18 administrative appeal was denied on the approximately the same dates – that is, approximately
19 seven years before the 2012 letter explaining DEA’s refusal to produce documents in the
20 absence of Plaintiff’s commitment to pay estimated fees.

23 The initial and fundamental problem with DEA’s motion for reconsideration and with
24 Plaintiff’s response to it is that both mischaracterize the issue that is properly before the court.
25 For reasons that will be explained, DEA’s characterization of its grounds for summary judgment
26 as “failure to exhaust administrative remedies” misses the mark as does Plaintiff’s
27 characterization of DEA’s grounds as a post-hoc rationalization of a prior final denial.
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1 The fee provisions of 5 U.S.C. § 552(a)(4)(A) do not specify a particular point in the
2 process where fees are to be calculated and the requestor is required to either pay the fee or
3 apply for waiver. Certainly an agency cannot be required to establish an estimated fee where the
4 extent of its obligation to respond is being challenged. In this case, it cannot be held that DEA
5 was obliged to estimate fees where it had made the initial determination that Plaintiff's FOIA
6 requests for Oales and Alho failed to adequately state a request to which DEA could respond.
7 It is significant that DEA as well as FBI maintained a consistent position that they were not
8 obliged to "confirm or deny" the existence of documents in their possession that were responsive
9 to Plaintiff's FOIA request up until the court's memorandum of July 22, 2010, denying without
10 prejudice Defendants' motions to dismiss and for summary judgment. Doc. # 86. Up to that
11 point, it is reasonable the DEA would not have brought up the issue of fees because there was no
12 basis to expect that production of documents would be required.

13 Although the court did not use the term "Vaughn index" in its July 22 memorandum, the
14 court did make clear that DEA's reliance on FOIA exemptions requires record-specific reasons
15 for application of the exemptions claimed. See Doc. # 86 at 36:3-12. Due to continuances
16 requested by both parties, the court did not address Defendants' motion to dismiss filed on
17 September 13, 2010, until July of 2012. In the intervening time, the Ninth Circuit's decision in
18 Pickard v. Dep't of Justice, 653 F.3d 782 (9th Cir. 2011) had been published and it became clear
19 to DEA and FBI that a Vaughn index would be required in order to justify the application of
20 FOIA exemptions or exclusions to documents responsive to Plaintiff's FOIA request. It was not
21 until this time that DEA had reason to know that it would be required to do actual research to
22 find documents responsive to Plaintiff's FOIA request and therefore that the requirement for
23 payment of estimated fees would become applicable.

24 Plaintiff's first error, therefore, is to characterize DEA's 2004 letters denying Plaintiff's
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FOIA requests as to Alho and Olaes as “final denials” of Plaintiff’s FOIA requests and his characterization of the June 18, 2012, letter as a second “final denial” on different grounds. The DEA’s 2004 letters were notifications that DEA would do no further work on Plaintiff’s FOIA requests as submitted, but were also notifications that DEA *would* proceed with the FOIA requests if the deficiencies noted by DEA were corrected. Similarly, DEA’s letter of June 18, 2012, is not a second letter of denial, it is a further notice of deficiencies in Plaintiff’s FOIA requests because of defects in the descriptions of the documents requested, and a notice that if the deficiencies were corrected, DEA would proceed to search for and process responsive documents upon payment of the estimated fee. So far as this court is aware, Plaintiff has never received a “final” denial of his FOIA requests; the only “final” determination to date is the denial of Plaintiff’s implied application for waiver of fees. Therefore, the issue properly before the court is not whether DEA is entitled to summary judgment because Plaintiff failed to exhaust administrative remedies; it is whether DEA properly denied Plaintiff’s application for waiver of fees. So far as the court can determine, that issue was administratively exhausted and is the crux of Plaintiff’s motion to compel DEA to produce a Vaughn index. It is to that issue the court directs its attention.

II. DEA Properly Denied Waiver of Fees as to FOIA Requests for Ahlo and Olaes

To offset the cost of fulfilling document requests, FOIA authorizes agencies to collect processing fees. [5 U.S.C.] § 552(a)(4). There are three basic types of fees: “search” fees to cover the cost of agency personnel time spent locating the requested documents, “review” fees to cover the cost of personnel time spent determining whether any requested documents are exempt from disclosure, and “duplication” fees to recover the cost of actual duplication as well as any personnel time spent in the duplication process. 28 C.F.R. § 16.11(b), (c). When records are “requested for commercial use,” an agency may, in accord with its own regulations, assess search, review and duplication fees. 5 U.S.C. § 552(a)(4)(A)(iii)(I). When records are “not sought for commercial use and the request is made by an educational or noncommercial scientific institution . . . or a representative of the news media,” the agency may collect only duplication fees, not search or review fees. *Id.* § 552(a)(4)(A)(ii)(II). Any other requests for noncommercial use are

1 subject to both search and duplication fees, but not review fees. *Id.* §
2 552(a)(4)(A)(ii)(III).

3 Notwithstanding the foregoing fee assessment criteria, FOIA requests
4 must be processed “without any charge or at a charge reduced below” the
5 agency’s established fee schedule “if disclosure of the information is in
6 the public interest because it is likely to contribute significantly to public
7 understanding of the operations or activities of the government and is not
8 primarily in the commercial interest of the requester.” *Id.* §
552(a)(4)(A)(iii). If no fee waiver applies, an agency may require
prepayment before beginning to process a request if “the agency has
determined that the fee will exceed \$250. *Id.* § 552(a)(4)(A)(v). If the
requester refuses to prepay these fees, “the request shall not be considered
received and further work will not be done on it until the required
payment is received.” 28 C.F.R. § 16.11(i)(4).

9 Coleman v. Drug Enforcement Administration, 714 F.3d 816, 819 (4th Cir. 2013).

10 In this case there is no dispute that DEA estimated the total of applicable fees would be
11 in excess of \$2,000 and requested that Plaintiff pay the fees, or promise to pay the fees, in
12 advance. Plaintiff has not disputed that he declined to pay or promise to pay DEA the requested
13 fees. As a consequence, DEA is justified in declining to do further work to prepare documents
14 responsive to Plaintiff’s FOIA request and in declining to provide any information responsive to
15 Plaintiff’s request *unless* Plaintiff’s FOIA request falls within the category of requests “likely to
16 contribute significantly to public understanding of the operations or activities of the
17 government.”
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19 Plaintiff’s purposes in making his FOIA requests are explained in the affidavit attached
20 to his amended complaint. See generally Doc. # 11 at 21-31. In his affidavit, Plaintiff alleges
21 the purposes with regard to his FOIA requests as to the subjects Olaes and Alho. With regard to
22 Olaes, Plaintiff’s affidavit alleges that US Attorney Sorenson was informed that Olaes “(1) stole
23 various amounts of drug from each [FBI or DEA directed drug] purchase prior to turning it over
24 to the FBI; (2) purchased methamphetamine on a weekly basis from an undisclosed source; (3)
25 obtained methamphetamine on a number of occasions from his targets for further distribution
26 without informing the FBI; (4) smoked methamphetamine throughout his entire participation;
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1 and (5) lied to federal investigators.” Doc. # 11 at ¶ 20. Plaintiff alleges his trial began with a
2 statement by US Attorney Sorenson told the jury that Plaintiff “had been a target of a DEA
3 investigation since September of 1999, after being implicated of [sic] involvement in drug
4 trafficking following the arrest and conviction of a Donald Grimm.” Doc. # 11 at ¶22.

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6 Plaintiff states that *with regard to DEA*, the purpose of making the FOIA requests with
7 regard to Olaes is to gain evidence to challenge Sorensen’s allegedly prejudicial statement
8 regarding Plaintiff’s status as the subject of a DEA investigation since 1999. As far as the court
9 can discern from Plaintiff’s affidavit, Plaintiff’s only reason for seeking information regarding
10 Alho from DEA is to show that Alho functioned as a paid informant for both FBI and DEA.
11 Overall, Plaintiff’s affidavit makes a number of accusations regarding the relationship between
12 *FBI* and Olaes and *FBI* and Alho. Plaintiff characterizes these relationships as reflecting
13 governmental corruption which Plaintiff hopes to evince by retrieving documents through FOIA
14 that show the profiting of individual FBI agents from seized property, the profiting of informants
15 through the governmental practice of paying for information provided, and collusion between
16 the state law enforcement agencies and the FBI to further the scheme of corruption. However,
17 Plaintiff’s explanation of his purposes in obtaining information from *DEA* are devoid of any
18 accusation of agency misconduct other than the misconduct suggested by the practice of
19 rewarding informants for their cooperation.
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22 Thus, while Plaintiff’s affidavit arguably states a basis for *public* interest in the
23 relationship of either Alho or Olaes to FBI, the court can find nothing that could arguably fit
24 within the realm of public interest with regard to Plaintiff’s FOIA request to DEA. Plaintiff’s
25 averments that either or both Alho or Olaes functioned as paid informants to DEA is not a matter
26 of public interest inasmuch as the allegation represents nothing more than a specific instance of
27 an allegedly general practice. Similarly, whether Sorenson’s statement that Plaintiff had been
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1 the subject of DEA investigation for a substantial period of time is either false or prejudicial is
2 not a matter of public interest; it is a matter of interest to Plaintiff and his defense only. It is
3 therefore this court's conclusion that, with regard to Plaintiff's FOIA requests to DEA, Plaintiff
4 has failed to show that his FOIA request to DEA qualifies for waiver of applicable fees.
5 Because the waiver provisions of section 552(a)(4)(A)(iii) do not apply under the facts of this
6 case, DEA had no obligation, and continues to have no obligation, to act on Plaintiff's FOIA
7 request in the absence of payment or the promise of payment of fees.
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9 **III. Plaintiff's Request for Instructive Order and Conclusion**

10 Following DEA's motion for reconsideration, Plaintiff filed a request for instructive
11 order regarding the motion for reconsideration. The gist of Plaintiff's request for instructive
12 order is he appears to have been under the impression that the court's order of October 29, 2014,
13 denying summary judgment as to DEA was somehow final and not susceptible to a motion under
14 Rule 60(b). That impression is, of course, erroneous. The court is aware that, because it did not
15 specifically inform Plaintiff that the October 29 Order was reviewable under Rule 6(b), Plaintiff
16 did not submit a formal opposition to DEA's motion for reconsideration.
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18 While the fact the court did not respond to Plaintiff's request is something of an
19 oversight, the court nonetheless finds that it need not solicit Plaintiff's opposition prior to
20 granting the DEA's motion for reconsideration. There are two reasons for this finding. First,
21 Plaintiff adequately explained his position regarding qualification for waiver in his affidavit and
22 adequately presented his argument regarding post-hoc rationalization in his motion to compel.
23 The court finds that in sum, Plaintiff presented all relevant arguments for application of fee
24 waiver. Second, and perhaps more important, the court's ruling on DEA's motion for summary
25 judgment does not prejudice Plaintiff because it has relatively little effect on Plaintiff's overall
26 effort to gain access to information to the relationship between DEA and Oales or Alho. The
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1 quality and quantity of information that Plaintiff is legally entitled to recover through the FOIA
2 process will be determined by the extent to which the court finds FBI's invocation of FOIA
3 exemptions apply in light of the Vaughn index that has been produced by FBI or any future
4 Vaughn index that may be required by the court. Once it becomes clear what information
5 Plaintiff may recover under FOIA under the particular facts of this case, Plaintiff is free to
6 resubmit his FOIA request to DEA if he finds that the information recoverable is worth the cost.
7 Because there is no prejudice to Plaintiff, the court finds that further prolongation of proceedings
8 to receive an opposition to DEA's motion for reconsideration is not necessary.
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12 THEREFORE, for the reasons stated, it is hereby ORDERED, that the motion of
13 defendant DEA for summary judgment is DEEMED to be a motion to dismiss Plaintiff's FOIA
14 claim against DEA for failure to state a claim upon which relief can be granted. The court finds
15 Plaintiff has failed to state a claim for which relief can be granted because Plaintiff has failed to
16 pay the statutory fees and has failed to show entitlement to fee waiver. The DEA's motion to
17 Dismiss is therefore GRANTED. Plaintiff's claim under FOIA against DEA is hereby
18 DISMISSED without prejudice. Plaintiff's motion to require DEA to produce a Vaughn index is
19 correspondingly DENIED.
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22 IT IS SO ORDERED.

23 Dated: September 28, 2015


24 SENIOR DISTRICT JUDGE
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